(12)

No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW
AND KIMBERLY J. ENDERSON
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND
ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEES

J. Robert Brame, III
901 East Cary Street
Richmond, VA 23219
(804) 775-4305

General Counsel
Republican Party of Virginia

Patrick M. McSweeney
11 South 12th Street
Richmond, Virginia 23219
(804) 783-6802

Chairman
Republican Party of Virginia

Daniel A. Carrell
951 East Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
901 East Cary Street
Richmond, VA 23219
(804) 775-4319
Counsel for Appellees

62 pp

QUESTIONS PRESENTED

1. Do the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, apply to voting in elections, as stated in the text of the Act and implementing regulations, and as determined by existing case law, or should those requirements be extended to delegate filing fees and other rules for party political conventions?

2. Does § 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, authorizing the Attorney General to institute suit, at his or her discretion, to enjoin those poll taxes in certain areas that meet the criteria specified in that Section, create a private cause of action under the Voting Rights Act?

3. Does a requirement that those offering themselves as candidates for delegate to a state party convention pay a delegate filing fee constitute a "poll tax" within the meaning of the Voting Rights Act?

4. Is this appeal moot where individual plaintiffs have challenged a private political party's filing fee for delegates attending its state nominating convention when the convention has been held and concluded?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

OTHER LEGISLATIVE MATERIALS

OTHER AUTHORITIES

No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW AND KIMBERLY J. ENDERSON
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEES

STATEMENT OF THE CASE

On December 16, 1993, the Republican Party of Virginia ("the Party") issued a call for a state convention to be held on June 3, 1994, to nominate the Party's candidate for United States Senator. Joint Appendix ("J.App.") at 6. Pursuant to the call, all registered voters in accord with the Party's principles and willing if asked to state their intent to support the nominee of the Party were permitted to participate in local mass meetings, canvasses or conventions conducted exclusively by officials of the Party. J.App. at 61. Those who wished to be selected by such methods as delegates to the state convention were required to pay a

registration fee. J.App. at 6. Under the Party rules, election as a delegate is not automatic. Candidates for delegate may be slated off and, even if elected, may be instructed. J.App. at 23. In recent years, the campaign organizations of competing candidates for party nomination have eschewed such tactics as a party unity measure. Hence, for purposes of ruling on a motion to dismiss, the court below accepted Appellants' contention that payment of the fee was tantamount to election.

Appellants, three law students at the University of Virginia Law School (collectively, "the Law Students"), were registered voters of Virginia at the time the call was issued. Appellant Bartholomew alleges that he was deterred from filing as a delegate by the $45.00 fee collected by the Albemarle County Committee. J.App. at 8-9. Appellant Enderson alleges that she was deterred from filing as a delegate in Hampton, Virginia by the $45.00 fee collected in Hampton. J.App. at 9. Appellant Morse paid the fee under complicated circumstances no longer relevant to his claim. J.App. at 6-8.

Five months after the call, and five weeks before the convention was scheduled to be held, the Law Students filed suit seeking an injunction against the delegate selection process. J.App. at 1. The Party timely filed an answer and motion to dismiss under FED. R. CIV. P. 12(b)(6), which the Party supplemented with an affidavit. J.App. at 2. The affidavit established that the Party had decided to nominate its candidate for United States Senate by convention in 1964, 1966, 1970, 1972, 1976, 1978, 1982, 1984, and 1988

(J.App. at 24),[1] and that the delegate fee had increased with time since 1964. *Id.* For purposes of its analysis, the court below found that no fee had been charged in 1964.

After briefing and argument, the three-judge court convened pursuant to the Voting Rights Act denied the Law Students' motion for a preliminary injunction and granted the Party's motion to dismiss the Voting Rights Act claims, holding that § 5 of the Act applies to voting in elections, and not to delegate selection rules, and that § 10 of the Act does not support a private right of action. The three-judge court declined jurisdiction over several claims not made under the Voting Rights Act, leaving the plaintiffs free to pursue such claims before a single judge if they were so advised. Instead Law Students have obtained a stay of those claims. J.App. at 3. This appeal followed.

---

[1] The Party's Central Committee filled vacancies in 1964 when the convention refused to oppose Sen. Harry F. Byrd, and in 1978 when the convention's nominee was killed in a plane crash. A primary planned in 1990 was cancelled when no opposition candidate came forward. J.App. at 24. The nomination for the seat involved in this case has always been filled by convention or by the Central Committee (1964, 1970, 1976, 1982, 1988 and 1994).

SUMMARY OF ARGUMENT

If this Court construes the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* (1988), in light of its own clear language, the Court below must be affirmed. The thrust of the argument of the Law Students, and of the United States as amicus, is that policy reasons exist which should lead this Court to disregard the clear language of the statute. However, those policy arguments are based upon a misapprehension of what this case involves and what it does not.

Despite the Law Students' heavy reliance on *Smith v. Allwright*, 321 U.S. 649 (1944), and related cases, this is not a case about racial discrimination. No argument is made that the Party has engaged in any discrimination in the past or intends to engage in discrimination in the future. In fact, in framing their metaphorical argument that the Party's convention is really a primary, the Law Students argue that the Party has been over-inclusive by not implementing practices permitted by its rules to exclude convention delegates.

This case is also not about any requirement to preclear changes in methods of conducting nominations. This issue has been tacitly raised on appeal by the Law Students, and is argued by the NAACP as amicus, but was not advanced, argued, litigated or decided below. The Party's nomination for the Senate seat involved in the present controversy has not been filled by primary at any time since the enactment of the Voting Rights Act.

What this case is truly about from a policy standpoint is whether a forced, unnatural and impractical construction

of the Voting Rights Act will be adopted. In arguing that preclearance applies to party conventions, the Law Students advance a totally infeasible construction of the Voting Rights Act. The practical effect of requiring any preclearance of convention rules and practices would be to require preclearance of all of them, there being no principled distinction between rules relating to the delegate fee and the internal rules of a convention. There is no means to separate the Party's activities into those that are "nomination-related" (*see* Brief of the United States at 20) and those that are not.

The Party's essential purpose and goal is to shape public policy through the election of candidates to public office. The construction of the Voting Rights Act sought by the Law Students would be tantamount to a rule forbidding conventions because conventions adopt their own rules when they convene, and there is therefore no practical methodology for preclearance by the government. The response of the United States that political parties must simply reorganize themselves to facilitate governmental regulation of internal decisionmaking is extraordinarily insensitive to core rights of political association. The claim that government can force such reorganization would be unconstitutional beyond question if such a power were to be claimed by a state. Appellants offer no principled explanation why First Amendment rights should be disregarded here to accomplish an unprecedented intrusion into the right of political association.

Of course, from a practical standpoint, the sheer number of mass meetings and conventions in every subdivision of the Commonwealth would make preclearance of times, places and rules for each election cycle unworkable. Moreover, the interpretation advocated by the

Law Students and the United States would not only thrust the federal government directly into the sensitive areas of freedom of speech and political association in violation of the cautions in *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)(*per curiam*), but would necessarily lead to the unedifying spectacle of the political conventions of one party being subject to the veto of the partisan political appointees of the other. Given the continuation of our two-party system, this would occur in approximately half of the instances of preclearance. There is no necessary construction of the Voting Rights Act that mandates such a perverse result. By adopting the Law Students' construction of § 5, 42 U.S.C. § 1973c (1988), the Court would be drawn into a long and convoluted process of defining the limits of prior restraint on associational rights. The Court should reject any unnecessary construction of the Voting Rights Act which raises such grave constitutional questions.

The outlook reflected in the arguments of the Law Students and the United States is that the right of free political association should be regulated for fear that it might be misused in the future. Without preclearance the Party might engage in racial discrimination in the future, it is said. There are societies, of course, which do limit and regulate such fundamental rights as speech, travel and association for fear that they will be misused. Our traditions, however, are wholly to the contrary and stand as a firm impediment to ignoring the plain language of the Voting Rights Act in order to advance a policy of prophylactic regulation of fundamental rights.

There is no evidence that Congress intended to trench on such rights. Section 5 of the Act itself reaches certain states and their political subdivisions. It also reaches primary

elections because the conduct of elections is a traditional state function which remains public even when delegated to a party. There is no state function in conducting conventions or in nominating candidates. Indeed, states do not and may not undertake such functions. Thus, this is not a case about the exercise of public electoral functions delegated to a political party. There are statutes in the Commonwealth of Virginia that purport to regulate the timing of nominating conventions. There are statutes which presume that established parties have sufficient public support to warrant ballot placement without the necessity of circulating petitions. However, there is no law which delegates state functions to Party conventions and there is no state action implicated in this case sufficient to invoke the preclearance requirements of the Voting Rights Act.

Section 5 of the Voting Rights Act applies to actions by a state or its political subdivisions affecting voting in an election. Section 5 is extended by regulation to the activities of a political party if the party is performing a public electoral function delegated by a covered jurisdiction. Even in the broader context of constitutional state action, the litigant seeking to show that a private party is engaged in state action must prove the nexus between the state and the challenged *action*, and cannot rely on the relationship between the state and private actor. The action challenged here, the promulgation of rules for a party convention, has never been a state function, unlike the conducting of primary and general elections. Hence, the required nexus is lacking.

Even the cases most heavily relied upon by the Law Students, such as *Smith v. Allwright* and *Terry v. Adams*, 345 U.S. 461 (1953), do not stand for a plenary federal power to regulate the internal activities of political parties. The White

Primary Cases and *Terry v. Adams* stand for the proposition that when a state has been violating the Fifteenth Amendment and resorts to subterfuge to evade federal attempts to curb the violations, the Court has the ability and power to reach the methods of evasion. Moreover, under the facts in those cases, the state had clearly fostered the allegedly "private" discrimination in connection with the election of public officials. Finally, this prong of the analysis of state action through private actors has not been incorporated into 28 C.F.R. § 51.7 (1993), the regulation which purports to reach party activities when the party is discharging a public electoral function under a delegation of state authority. Of course, even if the "fostering" analysis of the White Primary Cases were relevant to the Voting Rights Act, there is no allegation that the state has "fostered" the challenged fee, nor has the election of public officials, as opposed to the mere nomination of candidates, fallen into private hands.

With respect to the poll tax issue, Congress could not have intended for the Voting Rights Act to create a private cause of action to challenge poll taxes in 1965. The Act did not even purport to abolish poll taxes. What it purported to do was to provide the Attorney General of the United States with authority to challenge poll taxes where these were used as subterfuge for invidious racial discrimination. This being the case, the principles applicable to finding an intention on the part of Congress to imply a private right of action simply are not satisfied. Subsequent amendments to the Voting Rights Act have evinced no intention to alter this conclusion.

Because the convention in question has been held, the Law Students' action to enjoin the convention fee is moot.

ARGUMENT

I. THE LAW STUDENTS' PRECLEARANCE CLAIM SEEKS A RADICAL EXTENSION OF THE VOTING RIGHTS ACT THAT GOES BEYOND THE ACT'S EXPRESS TERMS AND IS INCONSISTENT WITH CASE LAW, CONGRESSIONAL INTENT AND PAST PRACTICE.

A. This Case Does Not Involve "Voting" In "Elections" As Those Terms Are Defined In The Voting Rights Act.

The rule of decision in this case can be derived from a simple reference to the definitional provisions of the Voting Rights Act. The Law Students claim that the charging of a filing fee to delegates to the Party's convention is a change affecting voting that requires preclearance under § 5 of the Voting Rights Act. Section 5 requires preclearance of any change by a state or political subdivision of ". . . any voting qualification or prerequisite to voting or standard practice or procedure for voting . . ." that is different from what was in effect on November 1, 1964. 42 U.S.C. § 1973c (1988).

The applicability of § 5 to the Party's filing fee is refuted on the face of the statute. There must be a change in a standard or precondition to voting. "Voting" is defined, in § 14 of the Voting Rights Act, in terms of voting in an election. "Voting" includes " ... all action necessary to make a vote effective in any primary, special or general *election* ...". 42 U.S.C. § 1973*l*(c)(1) (1988) (emphasis added). In the context of the statute, the words "voting" in an "election" obviously bear their usual, ordinary and concrete meanings

and do not encompass more equivocal and metaphorical uses of the terms.

B. Extension Of § 5 Beyond Matters Affecting Voting In A Primary, Special Or General Election Is Not Supported By Case Law, Congressional Intent, Or Past Practice.

Certainly, when Congress wishes to encompass caucuses and conventions within the reach of election laws, it knows how to do so. The conclusion that Congress did not intend for the Voting Rights Act to cover nonprimary nominating processes is strengthened by contrasting the definition of "voting" set forth in 42 U.S.C. § 1973*l*(c)(1) (1988) with the definitions used in other federal election laws. In the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, for instance, Congress defined the term "election" when used in the Act to mean:

> (A) a general, special, primary, or runoff election;
>
> (B) *a convention or caucus of a political party which has authority to nominate a candidate*;
>
> (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
>
> (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

2 U.S.C. § 431(1) (1988) (emphasis added).

Congress has also recognized the same distinction between general, special and primary elections, on the one hand, and party conventions and caucuses held for purposes of nominating candidates, on the other hand, in 18 U.S.C. § 601(b)(2) (1988), which prohibits certain corrupt political practices. A similar distinction is made in 18 U.S.C. § 600 (1988). In both cases, Congress has specifically recognized political party nominating caucuses and conventions as activities distinct from general, special and primary elections.

In short, Congress is a body whose members are intimately familiar with the difference between primary and nonprimary nominating processes. They know how to make a statute applicable to political party nominating caucuses and conventions, if that is their intention. Section 5 of the Voting Rights Act, unlike the other election and campaign regulatory provisions cited above, has not been made applicable to nonprimary nominating processes.[2]

This Court has recently emphasized the focused and limited application of § 5 of the Voting Rights Act with its provisions being firmly tethered to voting in elections. In *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992), the Court held that the Voting Rights Act is not an

---

[2] The Law Students state that Congressman Bingham thought the Voting Rights Act would cover caucuses. Brief of Appellants at 21. *But cf.* Conf. Rep. No. 711, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2578, 2582 ("Section 14(c)(1) of the House bill includes as part of the definition of 'vote', whereas the Senate bill does not, voting *in elections* for candidates for 'party' office. The Senate receded and the conference report adopts the House version.")(emphasis added). Furthermore, as the Senate noted in its 1982 amendments to the Voting Rights Act, single comments by an individual do not constitute conclusive history. S. Rep. No. 417, 97th Cong., 2d Sess. (1982), at 129, *reprinted in* 1982 U.S.C.C.A.N., 301.

all-purpose antidiscrimination statute. The Court reviewed its decisions under the Act since *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), and summed them up as revealing "a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at 502. As to the facts presented in *Presley*, the Court said:

> The . . . Resolution is not a change within any of the categories recognized in *Allen* or our later cases. It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for its does not increase or diminish the number of officials for whom the electorate may vote. Rather, the Common Fund Resolution concerns the internal operations of an elected body.

Id. at 503. No more can be said of the conduct challenged here.

In *Presley*, the Court said that a faithful effort to implement the statute must begin by drawing lines between those governmental decisions that involve voting and those that do not. *Id.* The Court rejected arguments that § 5 covered changes in government operations affecting an elected official's authority, saying such a result would expand the coverage of § 5 well beyond the statutory language and the intent of Congress. *Id.* at 505. The Court continued:

> The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered state illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id. at 506. If § 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention as a delegate.

The court below not only properly relied upon the plain language of the statute, but also followed existing case law, particularly *Williams v. Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972)(three-judge court), *aff'd*, 409 U.S. 809 (1972), holding that § 5 of the Voting Rights Act does not apply to procedures for the selection of convention delegates not involving a primary or other election.

Williams involved a § 5 challenge to new rules promulgated by the Georgia State Democratic Party for selection of delegates to the National Convention in open conventions, replacing a system of appointment by the Party's previous gubernatorial candidate. *Williams*, Slip Op. at 2. The court cited the requirement of § 5 for state action, and the definition of voting in § 14, and concluded that § 5 did not reach the party delegate selection rules. The court held that the scope of § 5's requirement for action of a state or political subdivision is a question of statutory construction separate and apart from the meaning of state action in other contexts. *Williams,* Slip Op. at 5. The court reasoned that

the party's adoption of the rules did not constitute state action as required under § 5. Id. at 5.

The court in *Williams* explicitly considered, even to the extent of quoting, the language in the House Judiciary Committee report on the definition of "voting" in the Voting Rights Act upon which the Law Students now rely:

> Clause (1) of this subsection contains a definition of the term "vote" for the purposes of all sections of the Act. The definition makes it clear that the act extends to all elections - Federal, State, local, primary special or general - and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to election of candidates for "party" offices. Thus, for example, an *election* of delegates to a State party convention would be covered by the Act.

Williams, Slip Op. at 4 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2464)(emphasis added). The court then went on to hold that § 5 of the Act did not reach a change in state party rules for the selection of delegates to the national party convention. *Accord Jefferson v. Quarles*, No. 87-0356-R (E.D. Va. May 27, 1987)(three-judge court)(calling of a party caucus not subject to preclearance under § 5 because not related to voting in an election).[3] *Compare Walters v.*

[3] A copy of this unpublished opinion is being lodged with the Clerk.

Edwards, 396 F. Supp. 808, 815 (E.D. La. 1975)(three-judge court)(party officers elected in primary).

The Law Students' explication of this Court's prior jurisprudence with respect to primary elections is simply inapposite. This case does not involve a primary election. The distinction between a nominating convention and a political primary is fundamental. A primary involves the use and mechanism of the powers of the state. Only a state can conduct elections. Only a state can certify the results of an election. Only the state can place candidates on the public election ballot. On the contrary, conduct of the nominating convention cannot be a state function. The state has no power to nominate candidates. Thus, it cannot delegate that power to political conventions. The State's involvement in the nomination process is neutral.

The Law Students' argument that primary elections and nominating conventions are equivalent depends principally on dicta from the concurring opinion of Judge Pitney in *Newberry v. United States*, 256 U.S. 232, 286 (1926)(Pitney, J., concurring).[4] That the Law Students must resort to such attenuated authority for the central proposition of their case is as eloquent a comment on its weight as can be made here.

The Law Students also argue, Brief for Appellants at 33, that Justice Harlan recognized a practical equivalency

[4] *Newberry* as well as *United States v. Classic*, 313 U.S. 299 (1941), were criminal cases in which the court addressed whether primary elections for congressional offices were subject to Article 1, §§ 2 and 4 of the U.S. Constitution. Unlike *Smith v. Allwright* and *Terry v. Adams*, the cases were not decided under the Fifteenth Amendment, and they can shed no light on the scope of § 5 of the Voting Rights Act.

test in *Allen v. State Bd. of Elections*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part), that somehow supports their position here. Justice Harlan's observation that a nominating petition is the functional equivalent of a primary was not expressed in the context of determining whether state functions had been delegated. The issue before the court was whether a state statutory change affecting qualification of independent candidates for the general election was subject to preclearance. Obviously, § 5 coverage of a change in state laws affecting candidacy in a general election, which *Allen* thought to be near the outer limits of § 5 coverage, *Allen*, 393 U.S. at 572, can be no authority for the proposition that § 5 reaches the internal rules of a political party.

The Law Students continue their functional equivalency argument by citing a characterization of the 1978 Party convention as a great indoor primary. Appellants' Brief at 32. Here they simply beg the question. If a convention is not a public electoral function delegated by the state -- as it manifestly is not -- the use of a metaphor which originated in a newspaper column will not make it one.

Contrary to the argument of the United States that nominating activities of political parties have always been regulated under § 5, the actual evidence of any such practice is sparse indeed. It is conceded that the Party has never precleared times or the locations of its conventions or mass meetings, nor the fees used to fund them. The United States has cited but a single example, the 1982 delegate apportionment rules of the Democratic Party of Virginia, as representing a contrary practice. Brief of the United States at 12, n.7.

Isolated instances of preclearance of party rules are not probative of a power to regulate the internal affairs of a political party. Rules not subject to § 5 may well have been submitted out of an abundance of caution or in error. Had the Attorney General been routinely applying § 5 to the types of activities the United States claims are regulated, the evidence of such regulation would be abundant. *Cf.* S. Rep. No. 417 at 10, *reprinted in* 1982 U.S.C.C.A.N. 177, 181 (most frequent preclearance objections involved annexations, at-large elections, majority vote requirements, number of posts, and redistricting of boundary lines); *id.* at 13, *reprinted in* 1982 U.S.C.C.A.N. at 183 (numerous examples of failure to make required filings, none involving political parties).[5]

The Law Students quote from *Perkins v. Mathews*, 400 U.S. 379, 389 (1970), Brief for Appellants at 21, suggesting that the language supports an inference that Congress intended to regulate political parties. Although the quotation from legislative history in *Perkins* does refer to "political party committees," the continuation of the quote is required to understand the context:

> For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly

---

[5] Although the Law Students state that the so-called Turner Appendix shows other instances of preclearance of Party rules, the Appendix fails to document any practice of preclearing of convention rules. *See* Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 2264, 2271 (1981).

> enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.

Id. Obviously political party committees were not consolidating counties or redrawing election districts. The examples given in *Perkins* all involve governmental action rather than party rules, while the relevant legislative history is replete with references confirming that Congress understood § 5 to apply to instrumentalities of government. *See, e.g.*, S. Rep. No. 417 at 6, *reprinted in* 1982 U.S.C.C.A.N. at 183 ("any change in law"), 7, *reprinted at* 184 ("any new law"). Finally, the changes in *Perkins* were described as affecting "votes" and "voters."

The Law Students cite *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), for the proposition that the Voting Rights Act:

> imposed safeguards against circumvention by states *and political parties* which allegedly had shown themselves prone "to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."

Brief for Appellants at 14-15 (emphasis in original). But the cited case refers only to states, 383 U.S. at 335, and properly so in accordance with the language of § 5.

The additional authorities cited by the United States, Brief of the United States at 11-12, are consistent in requiring a showing of state action to invoke the provisions of § 5 of the Voting Rights Act. *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972)(three-judge court)(*per curiam*), relied on *Williams* in concluding that the Voting Rights Act does not protect an individual's right to participate in local conventions. 343 F. Supp. at 121 n.3. The remaining authority cited by the Law Students and the United States is not to the contrary. *Hawthorne v. Baker*, 750 F. Supp. 1090, 1095 (M.D. Ala. 1990)(three-judge court), *vacated*, 499 U.S. 933 (1991), held that the State Democratic Party was covered by § 5 to the extent it was empowered to conduct primary elections under state law. *Fortune v. Kings County Democratic County Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984)(three-judge court), held that all election rules for the county executive committee were covered by § 5 because of delegated public electoral functions. *See also Wilson v. N.C. State Bd. of Elections*, 317 F. Supp. 1299, 1302 (M.D.N.C. 1970)(three-judge court)(holding that an intra-party agreement was subject to § 5 when it was given force of law under a state statute).

In contrast, the Law Students' citation of cases dealing with filing fees for candidacy for public office is simply inapposite. Brief for Appellants at 30-31. *Board of Education v. White*, 439 U.S. 32 (1978), involved a regulation by a local school board, as a political subdivision of the state, affecting employees who were candidates for public office. *Id.* at 45, 36. *See also Bullock v. Carter*, 405

U.S. 134, 138 (1972)(filing fee in state primary election). Like "voting", the terms "filing fees", "candidates", and "party office" must all be understood in the context of elections.

Simply put, the Voting Rights Act applies to voting in elections. It has never been applied to the internal rules of party nominating conventions. Even where § 5 reaches the rules of party primary elections, coverage is premised on state involvement or state delegation of public election functions to the political party. 28 C.F.R. § 51.7 (1993).

Thus, the opinion of the Court below that the Voting Rights Act applies to voting in elections but not to convention rules is consistent with the plain language of the statute, the Conference Report and other legislative history, the case law, and prior practice. Would good policy be served by uprooting established understanding and expectations? Decidedly not.

II. THE RULE THAT THE LAW STUDENTS AND THE UNITED STATES CLAIM IS IMPOSED BY THE VOTING RIGHTS ACT WOULD ELIMINATE CONVENTIONS AS A PRACTICAL METHOD OF NOMINATION.

In *Presley v. Etowah County Comm'n*, this Court stated that the Voting Rights Act must be construed in a workable way. 502 U.S. at 506-08. If the filing fee is subject to preclearance, then all substantive rules governing the convention must fall under the same requirement. Yet it is conceptually and practically infeasible to preclear such rules. A convention by its nature has plenary power over its

proceedings. Its rules are not adopted until the convention is convened and the rules are presented and adopted.

The United States asserts the right of the federal government to preclear the time and place of all meetings, canvasses and local conventions leading up to any party convention, as well as to preclear any and all "nomination-related" rules or rules governing apportionment of voting power among delegates. Brief of the United States at 20-22. No practical test could be devised for the objective identification of "nomination-related" rules. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. at 505 (suggested distinction between budget and other actions unworkable).

Further, it is not clear that the Attorney General even has, or will continue to have, the resources to undertake preclearance of all "nomination-related" rules in the 131 units of the Party, the analogous organizations of the Democratic Party of Virginia and other parties, and in the parties in the other states and political subdivisions covered by the Voting Rights Act. *Cf.* S. Rep. No. 417 at 15, *reprinted in* 1982 U.S.C.C.A.N. at 192 ("It is already difficult for the Department to enforce the existing preclearance provisions with limited resources. The Department's burden would be increased dramatically if it were required to review proposed changes from every single state and political subdivision not now covered under Section 5." (citing testimony of Drew Days, July 13, 1981)).

Even if she had such resources, it must be evident that the Party would lack them, particularly at the local level. In that circumstance, the benefits of conventions would be denied to the Party by sheer regulatory weight. Commentators have recognized that nonprimary nominating

methods may be superior to use of a primary. Primaries generally attract small turnouts and may result in nominations being made by a small percentage of the vote. Moreover, primary voters may be unrepresentative of the party's voters. Nonprimary nomination facilitates a nomination strategy based on coalition building. Nonprimary nominations force the party leadership to give attention to maintaining the party's bases of support, and to developing reasonably consistent positions over time. Primaries, in contrast, offer incentives for separate elements of the party to compete rather than to cooperate. Divisive primary contests can fragment a party's support and adversely affect its candidates in the general election. Because primaries make the maintenance of stable party coalitions difficult, they also make party coherence difficult. A. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints On and Protection of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 273-76 (1984).

The interpretation of § 5 proffered by the Law Students is impractical for additional reasons. Although neither the Law Students nor the United States have addressed the opportunities for mischief and invitations to corruption inherent in placing the political activities of one party under the effective control of the partisan appointees of the other, *see Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986)(views of the state to some extent represent the views of the one political party transiently enjoying majority power), such practical concerns must be considered. Furthermore, mere delay in preclearing the waves of rules that must come before the Justice Department as each step in the process leading to state and national conventions takes place can impart advantage to one side and impede the activities of the other. Even innocent problems take on the

overtones of deliberate interference and invite litigation. Contemplation of the administrative difficulties as well as the political shoals to be navigated in such a scheme reinforces the Congressional wisdom in strictly limiting the preclearance responsibilities of political parties to such clear delegations of a public electoral function as primary elections.

The Brief of the United States seeks to overcome the impracticalities of regulating political conventions and preclearance of internal party rules by suggesting that political parties change to adopting rules in advance rather than at the convention. Brief of the United States at 22; *compare* J.App. at 24. To do so, however, would change the whole character of the Republican Party of Virginia from a voluntary association of individuals regulating themselves to an organization controlled by a few. Yet the United States argues that the Party must alter its basic form to facilitate its being regulated by the government. This "solution" directly contradicts this Court's ruling in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232-33 (1989), that the government cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure any more than it can tell a party that its proposed communication to party members is unwise.

The United States denies that it wishes to regulate core political activities, but it is unrealistic to suppose that nomination-related activities can be isolated from other activities of political parties. *Cf.* Brief of United States, at 21. Every activity of a political party is directed toward influencing public policy principally by means of electing candidates to public office.

Moreover, the United States arrogates to itself the definition of the proper scope of political conventions. Brief of the United States at 20. There is nothing in our history that supports a government limit on the subject matter to which citizens may address their attention. *Buckley v. Valeo*, 424 U.S. 1, 57 (1975)(*per curiam*). Indeed, this Court has ruled that a political party can structure itself internally as it sees fit, and it is not for courts to pass on the wisdom of such arrangements. *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123-24 (1981). If the practical objections to preclearance can only be addressed through such interference, then they are insurmountable.

III. THE INTERPRETATION OF § 5 OF THE VOTING RIGHTS ACT URGED BY THE LAW STUDENTS SHOULD BE REJECTED TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS BECAUSE THE ACTIVITIES OF POLITICAL PARTIES INVOLVE FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION PROTECTED BY THE FIRST AMENDMENT.

The construction of the Voting Rights Act advocated by the Law Students and the United States places the implementation of § 5 on a collision course with this Court's First Amendment jurisprudence concerning associational rights. Yet, there is no need to apply such a construction to § 5 because the language of the statute is plain and unambiguous.

Even if that were not so, the Court should apply the familiar principle that where an otherwise acceptable

construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)(citing many cases). To follow the Law Students' invitation would be to put the Fifteenth Amendment concerns addressed in the Voting Rights Act at cross-purposes with First Amendment associational rights, when in fact the two should be complementary.

The Court's decisions involving associational rights establish that the right of association is a basic constitutional freedom that is closely allied to freedom of speech, and which, like free speech, lies at the foundation of a free society. *Buckley v. Valeo*, 424 U.S. at 25 (citing *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). In view of the fundamental nature of the right to associate, governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny. *Id.* (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963)("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.")

> The First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people -- individually as citizens and candidates and collectively as associations and political committees -- who

> must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S. at 57.

If the Law Students' construction of the Voting Rights Act were valid, this case would necessarily involve the Court in a process of attempting to draw distinctions concerning the reach of the federal government into an area long recognized as involving the most sensitive and protected fundamental political rights of the nation's citizens. Yet, no reason has been presented here to blunt the traditional constitutional protection of associational rights by adopting the forced construction of § 5 sought by the Law Students.

The freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association. *Democratic Party of the U.S.*, 450 U.S. at 122. Government may not regulate this association even if it is argued that the burden imposed on the Party is minor. As this Court has said:

> [E]ven if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the

> ground that they view a particular expression as unwise or irrational.

Id. at 123-24. The Court also rejected a claim from the state that it had authority to regulate the party because of its power to appoint presidential electors, saying:

> Any connection between the process of selecting electors and the means by which political party members in a state associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance.

Id. at 125 n.31. The connection between a senatorial election and the nominating party's delegate selection process is certainly no closer. In *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975), like the present case an intraparty dispute over delegate qualifications, this Court held that the proper forum for an intraparty dispute over which delegates should be seated at the convention is the convention itself.

This Court has repeatedly sustained the right of political association against attempts by states to impose regulations that failed the test of strictest scrutiny. A state cannot compel a party to seat at its convention delegates chosen in violation of party rules. *Cousins v. Wigoda*, 419 U.S. at 491. A political party also has the right to select a standard bearer who best represents the party's ideologies and preferences, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 224; the right to endorse candidates, *id.*; the right to protect itself from intrusion by those with adverse political principles, *Ray v. Blair*, 343 U.S. 21, 221-22 (1952); the right to require those who wish

to be candidates to pledge support to the party's nominees, *id.* at 227; the right to choose the method of determining the makeup of a state delegation to the national convention; *Democratic Party of the U.S.*, 450 U.S. at 124; and the right to take internal steps affecting its own process for selecting candidates. *Tashjian v. Republican Party*, 479 U.S. at 224. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. *Id.* at 229-30. *Accord Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975)(en banc), *cert. denied*, 424 U.S. 933 (1976)("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution ... [T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.") In sum, a state cannot justify regulating the internal affairs of a political party without showing that such regulation is necessary to ensure an election that is orderly and fair. *Eu*, 489 U.S. at 233.

Despite these principles, the Law Students and the United States persist in asserting that the Voting Rights Act grants an unfettered right to the federal government to subject the proceedings of the Party to prior restraint. This would represent an unprecedented dimunition of associational rights in order to solve a non-problem.[6]

---

[6] There is no basis in any allegation of the Law Students for supposing that the Party desires to engage in any act which would contravene the Voting Rights Act if done by a state. *Cf. Eu*, 489 U.S. at 228 (a party presumably will be motivated by self interest not to engage in actions or speech that are contrary to its interests in political success).

If the Voting Rights Act in fact supported the Law Students' interpretation, there would be grave doubt about its constitutionality. Preclearance would fall into the form of a prior governmental restraint on First Amendment freedoms. The Congress can have had no such intention in enacting § 5, as its purpose was to promote full participation in the franchise.

IV. SECTION 5 OF THE VOTING RIGHTS ACT REQUIRES ACTION BY A STATE OR POLITICAL SUBDIVISION.

The Voting Rights Act when adopted expressly rested upon the enforcement power under the Fifteenth Amendment. P.L. 89-110, 79 Stat. 437 (1965); *South Carolina v. Katzenbach*, 383 U.S. at 325. Consistently with the Fifteenth Amendment, the preclearance provisions of § 5 of the Voting Rights Act apply only to states and their political subdivisions. 42 U.S.C. § 1973c (1988).

The statute itself does not mention political parties. However, the applicable regulations extend preclearance obligations to political parties where they are (1) performing public electoral functions and (2) exercising powers delegated by a covered jurisdiction. 28 C.F.R. § 51.7 (1993). Thus the determination whether preclearance is required depends upon a double showing.

United States v. Board of Commissioners, 435 U.S. 110 (1978), cited by the Law Students to support their claim that the Republican Party is covered by § 5, Brief for Appellants at 26-27, actually addressed the question whether a city was subject to § 5 under the circumstances there

obtaining. *Id.* at 113. There can be little question that a city is a political subdivision of a state. The Court held that Congress intended that all state actors within covered areas be subject to the Act. 435 U.S. at 129.

There is nothing in the case to suggest that its analysis has any applicability to private political associations. The Court's reference to "all entities", 435 U.S. at 118, must be understood in the context of the issue framed by the Court, whether a city could be subject to § 5 even if it conducted no voter registration activity. *Id.* at 113. A political party is not a subdivision or instrumentality of the government. Political party conventions do not exercise general governmental powers and are not a unit of government at all. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 612 (Wilkey, J., concurring in result).

A. The Virginia Statutes Cited By The Law Students Do Not Show The Exercise Of Public Electoral Functions And Delegated State Functions By The Party.

The Law Students' citation of several Virginia statutes utterly fails to establish the kind or level of state action required to subject the Party to regulation under 28 C.F.R. § 51.7 (1993) or the relevant case law. Furthermore, the Virginia statutes cited will not bear the construction advanced by the Law Students. Va. Code Ann. § 24.2-509(A) (Michie 1993 Repl. Vol.) is declaratory of rights a political party has independently of the state. There is no delegation of state power or authority to the party. Va. Code Ann. § 24.2-509(A) is merely prefatory to Va. Code Ann. § 24.2-509(B) (Michie 1993 Repl. Vol.), which purports to grant

incumbents limited rights in the decision concerning nomination methods. The latter provision has no application to the Party's 1994 convention, and moreover is itself susceptible to constitutional criticism. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 227.

Va. Code Ann. § 24.2-510 (Michie 1993 Repl. Vol.) sets deadlines for parties to complete their nominating process in order to get their candidate on the general election ballot. Va. Code Ann. § 24.2-511 (Michie 1993 Repl. Vol.) sets the procedure for notifying state officials of the nominees to be placed on the general election ballot.

By no stretch of construction can these statutes be held to constitute a delegation of a public election function when a political party exercises its associational rights in conducting a political convention. The provisions are nondiscriminatory, and apply to all organizations within their terms. The statutes do not purport to delegate a state power of candidate nomination by convention, since that is not and has never been a state function, unlike conducting elections. None of the statues require, restrict or otherwise affect the Party's ability to charge a delegate fee.[7]

---

[7] Contrary to the argument of the Law Students, Brief for Appellants at 24, the convention does not perform the "winnowing" function described in *Storer v. Brown*, 415 U.S. 724, 735, *reh'g denied*, 417 U.S. 926 (1974), a non-Voting Rights Act case. Unlike the California law described in *Storer*, nothing in Virginia law prevents an unsuccessful aspirant for nomination at the convention from running in the general election upon compliance with the usual requirements for independent candidates. *Compare* Va. Code Ann. § 24.2-506 (Michie 1993 Repl. Vol.) and Va. Code Ann. § 24.2-520 (Michie 1993 Repl. Vol.).

The Law Students' conclusion that public functions have been delegated can only be reached by the tortured logic of supposing the Party's right to nominate candidates for office somehow devolved from the state, and further by placing upon the cited laws a construction that would render them unconstitutional under the precedents of this Court. *See Tashjian v. Republican Party*, 479 U.S. at 217; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 229-30; *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. at 120-24.

In reviewing the Virginia election statutes, the Law Students seek to make much of the allegedly favored position of the party under the law. However, the fact that Virginia offers automatic access to the general election ballot to parties which have demonstrated significant public support is not a delegation of a public electoral function. It is merely a practical accommodation to political reality analogous at best to the grant of a public utility monopoly in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974), a grant held not to constitute state action. Virginia's laws are garden variety election laws that leave the line between state action and private action intact.

> An election ... is an amalgam of state and private action. Only the state can have an election; only the state can confirm an electoral victory. But these traditional and exclusive functions of the state are neutral. The state calls the election, establishes minimum voter and candidate qualifications and counts the votes. It does not, however, designate candidates or, usually, require anyone else to designate candidates. Indeed,

> it does not even ensure that there will be candidates or voters. It also does not determine the factors that will influence voter choice. The decisions to seek office, to vote, and to adopt one policy rather than another are entirely private. Any other approach to the electoral process would tend to thwart its basic purpose: mirroring the preferences of the majority.

Weisburd, *supra*, at 240-41.

"Automatic" ballot access is a misnomer in any event. The Virginia statutes establish minimum qualifications for candidates. These statutes require that a candidate demonstrate a significant degree of popular support before he or she is placed on the ballot. This is accomplished through requirements for petition signatures, or, as in the case of the Party, through its designation of the candidate as its own, the Party having demonstrated significant levels of popular support in the last election. The only difference is that the nominee of a "political party" that has made the required showing of popular support in past elections is credited with the party's showing. That candidate need not demonstrate the same level of personal support that an independent candidate must. *See* Weisburd, *supra*, at 242.

Virginia does not grant candidates access to the ballot who have failed to demonstrate the required level of popular support. Nor does state law require the Party to field a candidate. The state's recognition of the party's candidate could involve a delegation of state authority only if the Party is unable to demand such recognition anyway. Clearly, this Court has settled beyond question the lack of power of a state

to deny access to any candidate with significant levels of popular support. *American Party v. White*, 415 U.S. 767, 782 and n.14 (1974); *Jeness v. Fortson*, 403 U.S. 431, 441-42 (1971); *Williams v. Rhodes*, 393 U.S. 23, 33 (1968). Statutes granting ballot access merely recognize the state's constitutional obligation. *See* Weisburd, *supra*, at 242-44. Hence, there is no delegation of a public electoral function and § 5 does not apply.

The Republican Party of Virginia is not a political subdivision of the Commonwealth. The Party instead represents an association of citizens dedicated to changing the composition of government in every election. Those decisions under the Fifteenth Amendment upon which the Law Students rely simply have nothing to do with the situation that the Law Students have brought before the Court. Nevertheless, the Court's decisions concerning state action are instructive on the scope of § 5 of the Voting Rights Act.

B. The White Primary Cases And *Terry v. Adams* Do Not Suggest That The Nomination Of Candidates In A Convention Is A Delegated State Function Within The Meaning Of 28 C.F.R. § 51.7 (1993).

Smith v. Allwright, 321 U.S. 649 (1944), was the culmination of a series of cases known as the White Primary Cases in which this Court struck down a series of evasions by state authorities designed to perpetuate racial discrimination in voting. All of the cases were decided on constitutional grounds years before the passage of the Voting Rights Act.

In *Smith v. Allwright*, the Court held that where the primary and general elections are fused into a single instrumentality for the choice of public officers, state delegation of the power to fix the qualifications of primary voters is the delegation of a state function. 321 U.S. at 660. Because the state primary was strictly governed by statute, 321 U.S. at 663, a finding of state action was rendered. *Smith v. Allwright*, of course, did not involve political conventions.

A divided court in *Terry v. Adams*, 345 U.S. 461 (1953), followed *Smith v. Allwright* in holding that a state could not design its electoral apparatus to exclude voters on racial grounds from participation in choosing public officials. Justice Black, joined by Justices Douglas and Burton, found that:

> "[T]he effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely what the Fifteenth Amendment forbids -- strip negroes of every vestige of influence in selecting the officials [in question]..."

345 U.S. at 470. Justice Clark, speaking for a plurality of four Justices, concluded:

> Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play. *Smith v.*

> *Allwright*, *supra*, at 664; *cf. United States v. Classic*, 313 U.S. 299, 324 (1941); *Lane v. Wilson*, 307 U.S. 208, 275 (1939).

Terry v. Adams, 345 U.S. at 484.

The Law Students advance a theory of coverage under § 5 premised on fitting the Party's nominating convention on the Procrustean bed of *Smith v. Allwright* and *Terry v. Adams*. But these cases are not even analogous. The Law Students have as their theme the dual assertions that the Party is an instrumentality of the state and that the White Primary Cases provide the rule of decision for this appeal. But Virginia is not Texas in the days of white supremacy, and the Party's 1994 convention was not a surrogate for the Jaybird primary. A little history is instructive.

Frank B. Atkinson's history of the rise of the Republican Party in Virginia, *The Dynamic Dominion: Realignment and the Rise of Virginia's Republican Party Since 1945* (1992), urged on the Court by the Law Students as authority, demonstrates how inapt the comparisons are. Virginia, like Texas, was historically a one-party state, where winning the Democratic primary was tantamount to election. The poll tax was the cornerstone of the Democratic Byrd organization, which also relied upon discriminatory voter registration practices, and the absent voter law, all vigorously opposed by the small Republican Party, to perpetuate itself. *Id.* at 15-16. Before 1950, the total vote in the Democratic primary exceeded that in the general election. *Id.* at 38. But this ended more than a generation ago. Real two-party competition emerged in the 1950's and blossomed in the 1960's. Atkinson, *supra*, at 39. By 1965, both parties had recognized the importance of the growing

black electorate and were actively courting black support. *Id.* at 153.

At the Republican convention in 1988, the delegates nominated the first black Senatorial candidate of either major party in Virginia, Maurice A. Dawkins. Atkinson, *supra*, at 410-11. While Dawkins was unsuccessful in the general election, his candidacy would serve to refute any notion that the convention has operated in a racially discriminatory manner, had any such charge been made in this case, which it was not. Indeed, Dawkins had been a contender for the Party's nomination for lieutenant governor at the convention in 1985. *Id.* at 442. The Democratic Party nominated black State Senator Douglas L. Wilder for lieutenant governor in 1985. Wilder won the general election and went on to become Governor of Virginia in 1989. *Id.* at 413. Hence, the analogies the Law Students seek to draw are simply fanciful.

Moreover, the statutory language and the language of the implementing regulations make clear that Congress did not legislate to the outer limit of its Fifteenth Amendment power in § 5. *Cf. Williams v. Democratic Party, supra.* Section 5 does not expressly reach state action through political parties or other private actors. Nor are all forms of state action even incorporated into 28 C.F.R. § 51.7 (1993).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court summed up its recent jurisprudence on state action by ostensibly private actors as follows:

> The complaining party must ... show that "there is a sufficiently close nexus between the state and the challenged action of the

> regulated entity so that the regulation of the latter may be fairly treated as that of the state itself...." Second, ... our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.... Third, the required nexus may be present if the private entity has exercised powers which are "traditionally the exclusive prerogative of the State."

Id. at 1004, 1005 (citations omitted).

Thus, the dispositive issue in state action claims is the strength of the link between the state and the specific conduct, not between the state and the actor. In *Rendell-Baker v. Cohn*, 457 U.S. 830, 842 (1982), and *Blum v. Yaretsky*, *supra*, the Court narrowed the public function doctrine to decisions "traditionally the exclusive prerogative of the state". *See also Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928-29 (1982)(something more than private action pursuant to a state statute is necessary to characterize a party as a state actor).

28 C.F.R. § 51.7 (1993) defines the applicability of § 5's preclearance requirements to political parties. A change affecting voting (*i.e.*, as defined in the Act) made by a political party is subject to preclearance if the change relates to a public electoral function, and the party acts under authority explicitly or implicitly granted by a covered jurisdiction or subunit itself subject to the preclearance requirement of § 5. 28 C.F.R. § 51.7 (1993). The

regulation limits its examples of required preclearance of political party activities to the choosing in *primary elections* of party officials or delegates to party conventions.

The regulation incorporates some of the categories in *Blum v. Yaretsky*, but does not include state action resulting from the exercise of coercive power or fostering or encouragement such that the purportedly private decision must be deemed that of the state. *Smith v. Allwright* and *Terry v. Adams* cannot be fairly understood in isolation from the obvious fostering of discrimination and evasion of constitutional guarantees occurring in a one-party state. These cases do not stand for the radical proposition that parties are exercising delegated state functions whenever parties nominate candidates by convention who will be placed on the general election ballot. In *Smith v. Allwright* and *Terry v. Adams* the state electoral function implicated was the election of public officials and not the nomination of candidates. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625-26 (1991); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). *See also* Weisburd at 238 ("But nomination, the designation of particular individuals as candidates for particular offices, is not a state function at all, by tradition or otherwise.")

Because no case has held that nominating candidates for office without involvement of the state, and without the fostering of racial discrimination or willful evasion of the Fifteenth Amendment, is state action, the cases upon which the Law Students principally rely have literally nothing to do with this case. Furthermore, even if the Law Students were successful in inserting *Smith* and *Terry* standards into the regulation, it would be of no avail in this case because there is no allegation that Virginia has fostered the fee in question,

Jackson v. Metropolitan Edison Co., 419 U.S. at 358 (must be nexus between state and private action, not merely between state and private actor, for state action to be found in private act), and the fee does not depend upon the delegation of a public electoral function.

V. THE LAW STUDENTS FAILED TO CHALLENGE THE USE OF A CONVENTION TO SELECT THE NOMINEE BELOW AND CANNOT RAISE THIS ISSUE ON APPEAL.

At points in their brief, the Law Students appear to complain that the abortive change from convention to primary in 1990 required preclearance. Brief for Appellants at 31. The NAACP as amicus devotes its entire brief to this point. Because this issue was not raised below, it is not before the Court and the brief of the NAACP becomes moot.[8]

In any event, it is difficult to see why the events of 1990 would affect the Party's entitlement to continue its consistent practice of conventions. The holding of conventions is not a change. The Party's nominees for the Senate seat at issue have never been selected by primary in any period relevant to the Voting Rights Act. J. App. at 11. But in any event, this issue was not pled, briefed, argued or decided in the court below. As a natural and proper result, the lower court's decision does not address it. This Court will not decide a question not raised or addressed in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

---

[8] No other private amicus has briefed the § 5 issues raised in this appeal.

VI. BY ITS NATURE, CONTENT AND HISTORY, § 10 OF THE VOTING RIGHTS ACT CANNOT SUPPORT A PRIVATE RIGHT OF ACTION.

A. The Language And Legislative History Of § 10 Do Not Support Implication Of A Private Cause Of Action.

The court below disposed of the Law Students' poll tax claim on the procedural ground that § 10 of the Voting Rights Act, 42 U.S.C. § 1973h (1988), authorized the Attorney General, but not a private citizen, to bring an action before a three-judge court. Although the Law Students vigorously challenge this holding, the conclusion of the lower court was certainly correct. As this Court said twenty-five years ago in *Allen v. State Bd. of Elections*, 393 U.S. at 563, § 10 "... contains a provision authorizing a three-judge court *when the Attorney General brings an action* 'against the enforcement of any requirement of the payment of a poll tax as a precondition to voting ....'" (emphasis added).

The Law Students' claim that there exists a private right of action under § 10 ignores the history of poll tax legislation. The necessary premise of the Law Students' argument is that § 10 outlawed poll taxes. Despite claims to the contrary, it did not. Poll taxes in federal elections were abolished by the Twenty-Fourth Amendment. Poll taxes in state elections were held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in *Harper v. Board of Elections*, 383 U.S. 663 (1966), *after* the enactment of the Voting Rights Act in 1965.

A review of the enactment of § 10 is instructive. The House Judiciary Committee reported a bill that would have abolished the poll tax in any State or subdivision where it still existed. H.R. Rep. No. 439, *reprinted in* 1965 U.S.C.C.A.N. 2437. But the Report shows that Congress entertained substantial doubt concerning its power to abolish poll taxes by legislation. *See* H.R. Rep. No. 439, 1965 U.S.C.C.A.N. at 2479, 2480 (citing the Attorney General's testimony that Congressional abolition of poll taxes without evidence of specific discriminatory effect raised "the substantial risk of unconstitutionality", and other authorities to the same effect); *see also Harper*, 383 U.S. at 580 n.2 (Harlan, J., dissenting) (citing doubt expressed in Senate hearings on passage of the Voting Rights Act whether state poll taxes validly could be abolished through exercise of Congress' legislative power). In the end, Congress rejected the House bill's flat prohibition and enacted the original § 10. Conf. Rep. No. 711 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2578, 2580.

Section 10 was a narrow compromise authorizing the Attorney General to bring suit where he found that certain conditions were met. This is what the statute says on its face. This is what the legislative history documents. This grant of discretion to a public officer discloses no intent by Congress to create a private right of action.

No finding of a private right of action under § 10 is compelled by this Court's decision in *Allen v. State Bd. of Elections, supra*. *Allen* concerned § 5 of the Act, which the Court held to create substantive rights, but no specific remedy. 393 U.S. at 554-55. Section 10, on the other hand, creates no substantive rights, but explicitly limits its application to certain actions to be filed by the Attorney

General, and has continued to be so limited while other sections of the Act have been amended in recognition of the creation of private rights of action.

The Brief of amici The Lawyers' Committee for Civil Rights under Law and the American Civil Liberties Union effectively concedes that the Party's argument that there was no private cause of action under § 10 in 1965 is troublesome for their position. Brief of the Lawyers' Committee at 18. But both the Lawyers' Committee and the Law Students argue that the 1975 amendments to the Voting Rights Act, P.L. 94-73, 89 Stat. 400, created an implied private right of action under § 10. Brief of the Lawyers' Committee at 18-21 (amendments to § 10); Brief for Appellants at 41-42 (amendments to § 3). These arguments cannot be sustained. The legislative history demonstrates that the amendment to § 3 was limited to extending authority to the courts to grant the special remedies available in actions brought by the Attorney General in actions brought under § 3 by private parties. S. Rep. No. 295, 94th Cong., 1st Sess. (1975) at 49, *reprinted in* 1975 U.S.C.C.A.N. 774, 813. At the same time private claims were recognized in § 3, no change was made in § 10's narrow direction to the Attorney General. *Id.* at 44, 51, *reprinted in* U.S.C.C.A.N. at 811, 818.

Furthermore, claims of implied private causes of action are evaluated upon the intent of Congress when it enacted the statute in question. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984). By 1975 Congress was undoubtedly aware from decisions such as *Cort v. Ash*, 422 U.S. 66 (1975),[9] that such issues were being resolved by a

---

[9] *Cort v. Ash* was decided more than a year prior to the enactment of the 1975 amendments to the Voting Rights Act on July 30, 1976.

straightforward inquiry into whether Congress had intended to provide a private cause of action, and Congress would have provided evidence of such intent in later reenactments of the legislation if it intended to create a private right of suit. *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989). This principle applies to the 1975 amendments and with equal or greater force in view of the passage of the Voting Rights Act amendments of 1982, P.L. 97-205, 96 Stat. 131.

A statute that does not ban the poll tax, but instead grants discretion to the Attorney General to selectively attack poll tax provisions obviously does not create a private cause of action to be free of all poll taxes. Whatever rights citizens may have under the Twenty-Fourth Amendment or *Harper*, those claims, as the lower court held, cannot be pursued under the Voting Rights Act but must be asserted in the ordinary fashion before traditional district courts.

Section 10 has been the basis of a claim resulting in a published opinion only twice in the last ten years, once in *East Flatbush Election Comm. v. Cuomo*, 643 F.Supp. 260 (E.D.N.Y. 1986), a challenge to civil court fines as a "poll tax", and in this case below. The court in *East Flatbush Election Comm.* dismissed the claim, which is distinguishable from the claim here in that the challenged fines were at least imposed by the state. Given the lack of topicality for poll tax disputes, it is not surprising that Congress has never evinced an intent to provide a private cause of action under the Voting Rights Act to process such claims through three-judge federal courts.

B. A Delegate Registration Fee At A State Convention Is Not A Poll Tax.

Historically, it is clear what a poll tax is. A poll tax is a head tax imposed by the state. *United States v. Alabama*, 252 F. Supp. 95, 97 (M.D. Ala. 1966). This head tax must be paid before the right of franchise can be enjoyed. *Harper*, 383 U.S. at 664 n.1, 666 n.3. Because of the tendency for states which wished to depress the votes of racial minorities or the non-affluent to require the payment of poll taxes at times or in places which were difficult and inconvenient, *see Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965), poll taxes as a condition for voting were prohibited by the Twenty-fourth Amendment in federal elections and proscribed in state elections by *Harper*'s determination that the right to vote in an election may not be burdened financially.

The payment at issue here is not a poll tax. Not being imposed by the state, it is not a tax at all. Once again, the Law Students fail to distinguish between the government and a private organization.

Indeed, the Party in charging the challenged fee has merely sought to finance its convention through a large number of small contributions rather than relying on a few large contributors. The Court in *Buckley v. Valeo* has already recognized that eliminating this reliance is a vital governmental interest. 424 U.S. at 104. The Court has recognized that contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *Buckley*, 424 U.S. at 21.

Not being a burden on the right to vote in an election, the fee was not a poll tax. Not being a poll tax, it did not implicate § 10. Being a reasonable device for avoiding excessive reliance on large contributors, the charge was benign as a matter of policy under *Buckley*. Once again, the Law Students confuse legal categories with metaphor. The fact that a delegate filing fee and a poll tax both involve the payment of money hardly permits the former to be redefined into the latter.

VII. THE LAW STUDENTS' CLAIMS CONCERNING THE CONVENTION FILING FEE ARE MOOT BECAUSE THE CONVENTION HAS BEEN HELD AND CONCLUDED.

This Court has consistently held that claims concerning conventions and elections are moot once the activity to which the challenge pertains has been concluded. *Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979); *Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1979)(*per curiam*); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969)(*per curiam*); *Hall v. Beals*, 396 U.S. 45, 48 (1969)(*per curiam*); *Richardson v. McChesney*, 218 U.S. 487, 492 (1910); *Mills v. Green*, 159 U.S. 651, 657-58 (1895).

The Court on occasion has held that occurrence of the election or convention might not moot a challenge when the matter challenged is "capable of repetition, yet evading review." This exception to mootness applies when (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party

would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Here it is clear that the issues are capable of litigation in the time permitted. As the court below found, the Law Students delayed five months in bringing the action originally. Jurisdictional Statement Appendix at A-5. Only four months later, the case was decided below and briefed in this Court. A timely challenge can be litigated on its merits in the time available.

Moreover, the Law Students have failed to show that there is any reasonable expectation that they will be subject to the same action in the future. Challenged practices in elections or conventions are deemed likely to recur where they are required by statute or other generally applicable requirement. *See, e.g., Fishman v. Schaffer*, 429 U.S. 1325, 1329 n.4 (1969)(state statute governing access to ballot through nominating petitions); *Democratic Party of U.S.*, 450 U.S. at 115 n.13 (order of state's highest court applicable to future elections); *Anderson v. Celebrezze*, 460 U.S. 780,784 n.3 (1983) (action challenging constitutionality of a state's early filing deadline); *Storer v. Brown*, 415 U.S. at 737 n.8, (action challenging constitutionality of state election laws governing access to ballot for independent candidates); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)(Illinois state nominating petition statute). Here, the Party is not required by any law or rule to impose a fee. Furthermore, there is nothing in the allegations of the Law Students or the facts found by the court below to indicate that the Law Students intend to participate in any future Party convention. In *Brockington v. Rhodes*, *supra*, this Court held that an action challenging the validity of a state statute which required signatures on a nominating petition for an independent

candidate to the United States Congress was rendered moot by the occurrence of the election in which he sought to run. The candidate did not allege that he intended to run for office in any future election, nor did he attempt to maintain a class action on behalf of other putative individual candidates, present or future, or on behalf of other independent voters. *Brockington v. Rhodes*, 396 U.S. at 42-43.

Here, of course, it is unknown whether the Law Students will desire to be delegates in the future, will be charged fees in the future, or, indeed, will be qualified to be delegates at all by residence or party affiliation. Lawsuits should not proceed on hypothetical, abstract or pedagogical interests.

CONCLUSION

The Law Students claim that the federal government has the power to disregard the divide between state action and private political activity, and further claim that the government actually did so in passing the Voting Rights Act. In this the Law Students greatly err. The Voting Rights Act by its terms does not apply to this case. If it did apply in the way urged by the Law Students, administration would be impractical and the Act would violate fundamental rights. Under our laws as consistently construed by this Court, the ruling below should be affirmed.

Respectfully submitted,

J. Robert Brame, III
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4305

General Counsel
Republican Party of Virginia

Patrick M. McSweeney
11 South 12th Street
Richmond, VA 23219
(804) 783-6802

Chairman
Republican Party of Virginia

Daniel A. Carrell
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., Counsel of Record
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4319